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IN THE
SUPREME COURT OF THE UNITED STATES

No.....

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Petitioner,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Respondent,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Petitioner,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, The Supreme Court of the United States:

The petition of United States Fidelity and Guaranty Company, a corporation, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner is a corporation of the State of Mary-

land and duly authorized to write surety bonds and liability insurance in the State of Montana.

On September 20, 1934, Coverdale & Johnson, a copartnership, made a contract with the State of Montana providing for the construction of certain highway bridges on the Sun River Highway in Lewis and Clark County, Montana. The contract required Coverdale & Johnson to furnish a performance bond and also to furnish public liability insurance.

> "The Contractor shall carry public liability insurance to indemnity the public for injuries or damages sustained by reason of the carrying on the work. This insurance shall be in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance." (R 86).

The United States Fidelity and Guaranty Company wrote both the performance bond and the public liability insurance policy. The public liability policy contained the following exclusions:

> "This policy shall not cover loss from liability for, or any suit based on injuries or death:
>
> "Caused directly or indirectly by any draught animal, any automobile . . . . (including the loading or unloading thereof) elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations." (R 133-135-155).

The United States Fidelity and Guaranty Company advised the Montana Highway Commission by letter that the public liability insurance had been written. The letter was as follows:

"Oct. 1, 1934

"Attention: Mr. Whipps
Montana State Highway Commission
Helena, Montana
Dear Sir:

"Re: Coverdale & Johnson—NRH-275 "A"
Unit 2—$5,270.32
Coverdale & Johnson—NRH-176 "E"
Unit 2—$15,115.66

"I have executed and herewith enclose bonds covering the above captioned contracts.

"For your information, wish to advise that we have issued Contractor's Public Liability Policy PC-19715 for this assured, with Public Liability limits Ten Thousand and Twenty Thousand and Property Damage One Thousand. This policy is written for one year from October 1st, 1934. (R 113).

Yours very truly,
DON W. JACOBUS
Manager
By (s) L. K. ALBRECHT
Assistant Manager."

On December 12, 1934, Roberta Doheny and Marguerite Doheny were killed in an automobile accident while riding in the automobile of the partner Johnson, the accident having occurred at a point on the highway twelve miles from the point at which Coverdale & Johnson were building the bridges.

Thereafter, Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny and Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, sued Coverdale & Johnson in the District Court in Cascade County, Montana, in negligence actions and recovered judgments in both cases. On May 20, 1937, the judgments were affirmed by the Montana Supreme Court.

Thereafter, on refusal of the United States Fidelity and Guaranty Company to pay the judgments after demand, the Administratrix filed suits directly against United States Fidelity and Guaranty Company in Cascade County, Montana, praying for judgment in the amount recovered in the actions against Coverdale & Johnson. The latter cases were removed to the United States District Court on diversity of citizenship, and there consolidated and tried on December 26, 1939. The actions were tried without a jury and on September 13, 1940, the United States District Judge gave judgment for the plaintiff in both cases.

An appeal was taken by the defendant United States Fidelity and Guaranty Company to the United States Circuit Court of Appeals for the Ninth Circuit and on November 17, 1941, the judgment of the United States District Court was affirmed in a majority opinion concurred in by two of the Circuit Judges and in a minority opinion in which Circuit Judge Haney concurred specially.

The majority opinion by Circuit Judges Healy and Bowen, affirming the United States District Court, holds that the United States Fidelity and Guaranty Company, having furnished both the completion bond and the public liability policy, is not permitted to rely upon the exclusion provisions contained in the public liability policy, notwithstanding that the exclusions might otherwise be valid.

In the concurring opinion Circuit Judge Haney said:

"Third. I do not believe this case is a proper one

for the invocation of an equitable estoppel. My understanding of such an estoppel is the case where one, by his conduct has mislead another who relies on the fact indicated by such conduct, to his disadvantage. See 21 C. J. 1113, sec, 116. While an estoppel might arise here as against the state, appellee has relied on no conduct of appellant, and consequently has neither taken nor changed her position as a result of any action or conduct of appellant.

"I think the judgment should be affirmed but on the ground that recovery is had under the bond."

Estoppel was never pleaded or relied upon.

Estoppel was injected into the case for the first time in the decision of the Circuit Court of Appeals and appellant was never given any opportunity to meet it.

Motion for re-hearing was filed but was denied by the Circuit Court of Appeals.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has herein decided an important question of Federal law which has not been, but should be, settled by this Court, in that the Circuit Court of Appeals has based its affirmance of a decision of a United States District Court on an estoppel which was not pleaded or relied on below and which was not available to appellee or against appellant under the provisions of Rule 8(c), Rules of Civil Procedure for the District Courts of the United States, Act of June 19, 1934, Chapter 651.

Rule 8(c) of the Rules of Civil Procedure for the District Courts of the United States provides:

"AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirm-

atively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense."

Rule 12(h) of the Rules of Civil Procedure for the District Courts of the United States provides:

"WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, ..."

2. The Circuit Court of Appeals has herein decided an important question of local law in a way probably in conflict with applicable local decisions in that the Circuit Court of Appeals has based its affirmance of a decision of the United States District Court on an estoppel which was not pleaded or relied on below and which was not available to appellee or against appellant under the decisions of the Supreme Court of Montana, thereby depriving appellant of the right to be heard on the question.

3. The Circuit Court of Appeals has so far departed from the accepted course of judicial proceedings as to call for the exercise of the power of supervision by the Supreme Court of the United States in that the Circuit Court of Appeals, in a decision of great public importance, as will be pointed out in the brief has injected into its decision an equitable estoppel which was neither pleaded nor relied upon below and which was not available to appellee or against appellant under Rule 8(c) Rules of Civil Procedure for the District Courts of the United States or under the decisions of the Supreme Court of Montana; thereby introducing into the general law a rule heretofore unsanctioned by any of the courts

of the United States or the State of Montana, or any of the other states, so far as can be determined, and the effect of which is:

(a) Where any contracting public board, body, or commission requires, in general terms, as in the highway contract in this case, that:

> "The Contractor shall carry public liability insurance to indemnify the public for injuries or damage sustained by reason of carrying on the work. This insurance shall be in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance,"

the insurance company is estopped or prevented from writing any public liability insurance in any form, or containing any conditions, limitations or exclusions less broad than the language in the highway contract just quoted.

(b) By the decision of the Circuit Court of Appeals the estoppel becomes available to the members of the public (a class to which the plaintiffs in these actions belong) notwithstanding the fact that no representation was made to them upon which they could have relied to their detriment.

(c) By estoppel the contract (in this case the highway contract) becomes the insurance in place of the public liability policy.

(d) What was intended to be a policy of indemnity against legal liability only, becomes, by estoppel, a policy of absolute indemnity against injury or damage to the public by reason of carrying on the work.

(e) Under the circumstances in this case, which circumstances are no doubt in general application throughout the United States, contractors' public liability insurance is annulled, by estoppel or otherwise, and replaced by the general terms of the construction contract specifications which in themselves are not susceptible of being construed as a contract. As a consequence, unless all contracting public agencies shall modify their specifications to indicate the form and terms and conditions in contractors' public liability insurance there is no form or method by which such insurance can be written.

QUESTIONS PRESENTED

1. In an action by a member of the public as a third party claimant against a casualty company on a contractor's public liability policy was the Circuit Court of Appeals in error in holding, for the first time on appeal, that the Casualty company was estopped from relying on the exclusions in the policy when the question of estoppel had not been pleaded or raised below, or relied on by the plaintiff under the provisions of Rule 8(c) Rules of Civil Procedure for the District Courts of the United States; Act of June 19, 1934, Chapter 651.

2. In an action by a member of the public as a third party claimant against a casualty company on a contractor's public liability policy was the Circuit Court in error in holding for the first time on appeal, that the casualty company was estopped from relying on the exclusions in the policy when the question of estoppel had not been pleaded or raised below, or relied on by the

plaintiff as required by the decision of the Supreme Court of the State of Montana.

3. When a casualty company furnishes a performance bond to the Highway Commission of the State of Montana, on a contract for the construction of highway bridges and when the highway contract contains a standard specification as follows:

> "The Contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of carrying on the work,"

and when the casualty company furnishes a public liability policy containing an exclusion as follows:

> "This policy shall not cover loss from liability for, or any suit based on injuries or death;
>
> "Caused directly or indirectly by any . . . . automobile . . . . or other vehicle (including the loading and unloading thereof) elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations,"

and where the casualty company notified the Highway Commission as follows:

> "For your information, wish to advise that we have issued Contractor's Public Liability Policy PC-19715 for this assured, with Public Liability limits of Ten Thousand and Twenty Thousand and Property Damage One Thousand. This policy is written for one year from October 1st, 1934,"

(a) Can a member of the public who was injured in an automobile accident at a point twelve miles from the site of the contract work and who recovers judgments in the state court in Montana against the contractor and who then sues the casualty company on the public liability policy in a third party action in the United States Courts

avail himself on appeal of an estoppel which was not pleaded or relied upon in trial court?

(b) In the absence of pleading and proof of, or reliance on, estoppel below, is the Circuit Court of Appeals in error under Rules 8(c) and 12(h) Rules of Civil Procedure for the District Courts of the United States in holding that the casualty company is estopped from relying upon the exclusion provision in the public liability policy?

(c) In the absence of pleading and proof of, or reliance on, estoppel below, is the Circuit Court of Appeals in error in the light of the decisions of the Supreme Court of Montana in holding that the casualty company is estopped from relying upon the exclusion provision in the public liability policy?

(d) In the light of the facts and pleadings in this case the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the powers of supervision of the Supreme Court because:

(1) The Circuit Court of Appeals rested its decision on an estoppel which was neither pleaded nor relied upon in the lower court.

(2) By this decision the Circuit Court of Appeals has sanctioned the substitution of a general clause in the specifications in a construction contract in place of the particular provisions in the contractor's public liability policy; thereby transforming a contract of indemnity against legal liability, only, to a contract of absolute indemnity for the whole public,

the effect of which is to establish a legal precedent not heretofore sanctioned by any courts and of such significance as to substantially prevent contracting public boards or commissions from requiring contractors to furnish contractor's public liability insurance in any form.

JURISDICTION

I.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was rendered on November 17, 1941, and is officially reported in 123 Fed. (2) 746. The findings, conclusions and judgment of the trial court have not been officially reported.

II.

The jurisdiction of the trial court was not challenged and is based on diversity of citizenship with the requisite jurisdictional amount, U. S. C. A. Vol. 28, sec. 41(1); Judicial Code, Section 24 as amended.

The jurisdiction of the United States Supreme Court is invoked under the provisions of Section 240 of the Judicial Code as amended, U. S. C. A. Vol. 28, section 347.

The reasons for invoking the jurisdiction of the Supreme Court are:

1. Sections 8(c) and 12(h) of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, Chapter 651, are here involved.

2. As will be shown in the brief hereafter, the Circuit Court of Appeals for the Ninth Circuit has handed down

a decision, unsupported by legal precedent, and of such wide importance that it is in the public interest to have the question decided by the court of last resort.

(3) As will be shown in the brief on jurisdiction hereafter, the Circuit Court of Appeals for the Ninth Circuit in an important case has handed down an opinion which is contrary to the decisions of the Supreme Court of the State of Montana.

WHEREFORE, Petitioner respectfully prays that upon further consideration of this case this court may be pleased to reverse and remand the same to the Circuit Court of Appeals for the Ninth Circuit.

John E. Patterson

Attorney for Petitioner.

Howard Toole

W. T. Boone

Of Counsel for Petitioner.

UNITED STATES FIDELITY AND
GUARANTY CO.

vs.

DOHENY, ADMINISTRATRIX

BRIEF ON BEHALF OF PETITIONER

The summary statement of the matter involved covers most of the material facts in these cases.

In the complaint in the trial court the plaintiff alleged:

First: The execution of the highway contract between the State of Montana and Coverdale & Johnson. (R 4-27).

Second: In general terms but not in haec verba, plaintiff alleged that the highway contract required the contractor to furnish a performance bond (R 5-28).

Third: In general terms but not in haec verba, plaintiff alleged that the highway contract required the contractor to furnish public liability insurance to indemnify the public for injuries or damage sustained by reason of the carrying on the work (R 5-29).

Fourth: That the United States Fidelity and Guaranty Company notified the Highway Commission in writing that it had issued the contractor's public liability policy (R 6-29).

Fifth: Then follow the allegations of the automobile accident; the recovery of judgments in the state courts and the demand for and refusal of payments by the surety company. In the complaint none of the documents are pleaded except in general terms.

The defendant in the trial court filed a motion to dismiss and a motion to strike from each of the complaints (R 50-51-52).

The motions were denied (R 54).

In the answers (R 55 and R 59) the defendant, having admitted the documents referred to in the complaint alleged affirmatively that the public liability policy contained an exclusion under which the driving or using of any vehicle or automobile was excepted from the coverage provided in the policy (R 55 and R 59).

No reply was filed.

No estoppel was pleaded or relied on and no finding of estoppel was made by the trial court. Furthermore the trial court, after finding that the documents were executed as alleged in the complaint also found that "no information concerning its (the public liability policy) provisions was ever given to said State of Montana or said Highway Commission except" by the letter of October 1, 1934 (R 191), thereby finding that in effect no representation essential to estoppel was made to the state and certainly none upon which plaintiff, as a member of the public could rely.

The Circuit Court of Appeals concluded that the trial court had declined to give effect to the exclusion provision. It said:

> "It (the trial court) declined to give effect to the exclusion provision of the policy relating to the immediate place of injury, in effect holding appellant responsible as an insurer notwithstanding the exclusion." (Opinion of Circuit Court of Appeals.)

However, the Circuit Court of Appeals then went on to say:

> "Appellant is in the business of writing surety bonds and public liability policies, for which it charges a compensation. It has sought and obtained

from the state the right to carry on that business in Montana. It was fully advised of the broad requirement contained in the agreement, the performance of which it had guaranteed. We assume that, notwithstanding its performance bond, it was not itself obligated to write the required public liability policy, and we may assume further that if it did so it might incorporate therein such exclusions as it saw fit; but in the latter event a lively appreciation of its dual position, as well as a rudimentary sense of good faith, would have suggested that it seek a corresponding modification of the requirement or at least that it point out to the state the particulars in which its insurance contract fell short of the required coverage. See sec. 7528 R. C. Montana. Apellant did none of these things. On the contrary, its letter to the commission was calculated to induce that body to believe that a policy had been issued to the contractor as broad as that described in the specifications. There is not even a showing that the policy appellant wrote in this instance was a standard form in general use, or, more specifically, that policies written by concerns engaged in writing public liability insurance on behalf of contractors commonly contain exclusion clauses comparable with the one here. Under the circumstances appellant will not be heard to say that the policy it actually wrote was less comprehensive than the requirement, giving to the latter a fair and reasonable interpretation. To hold otherwise would virtually amount to the sanctioning or encouragement of frauds upon the state, and through the state upon its people and others within its borders. We are persuaded that the courts ought not lend their aid to such practices."

Thus, as indicated in Judge Haney's special opinion, invoking the doctrine of estoppel for the first time:

"Third. I do not believe this case is a proper one for the invocation of an equitable estoppel. My un-

derstanding of such an estoppel is the case where one, by his conduct has mislead another who relies on the fact indicated by such conduct, to his disadvantage. See 21 C. J. 1113, sec. 116. While an estoppel might arise here as against the state, appellee has relied on no conduct of appellant, and consequently has neither taken nor changed her position as a result of any action of conduct of appellant.

"I think the judgment should be affirmed but on the ground that recovery is had under the bond."

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in sustaining the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding that the defendant could not be "heard to say that the policy it actually wrote was less comprehensive than the requirement" in the construction contract:

(a) Because in so holding, the Circuit Court of Appeals was invoking an estoppel which was never pleaded, relied on or proven, and was unavailable against defendant under Rule 8(c) and Rule 12(h) of the Rules of Civil Procedure for the District Courts of the United States.,

(b) Because no estoppel existed in these cases.

3. The Circuit Court of Appeals erred in holding that the exclusions in the public liability policy were inoperative.

4. The Circuit Court of Appeals erred in holding that measure of defendant's liability must be determined by the provisions in the construction contract and not by those in the liability policy.

JURISDICTION

It is submitted that under these circumstances the Supreme Court should take jurisdiction:

I.

Because Rule 8(c) and Rule 12(h) of the Rules of Civil Procedure for the District Courts of the United States provide that:

> "In pleading to a preceding pleading a party shall set forth affirmatively .... estoppel .... and any other matter constituting an avoidance or affirmative defense." Rule 8(c)

and

> "WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion, as hereinbefore provided or, if he has made no motion, in his answer or reply, ... " Rule 12(h).

These rules will be discussed later in this brief.

II.

This Court should take jurisdiction because the Supreme Court of Montana has held repeatedly that a party must plead estoppel to rely on it unless he has had no opportunity to plead it. The Montana cases are discussed hereafter.

III.

Wholly aside from the question of pleading, this Court should take jurisdiction because, as will be shown, similar contract provisions and contractor's public liability insurance are in effect in many, if not in most, of the public construction contracts throughout the United States, including the United States Bureau of Public Roads; the

United States Reclamation Service; the United States Public Works Administration; The Montana State Highway Commission (and probably most other State Highway Commissions); the Montana Water Conservation Board; some and probably many irrigation district commissions; school boards and other public contracting bodies.

As will be shown, it is in the interest of uniformity of decision and in the public interest to have this question decided by the court of last resort.

I. and II .

The above cited Rules of Civil Procedure for the District Courts of the United States are not out of harmony with the general law. It is the majority rule, both at law and in equity, whether by judicial interpretation, or by force of rule that a party who has an opportunity so to do must plead specially an estoppel (19 American Jurisprudence 382).

In Gilmer vs. Poindexter, 10 Howard 257; 13 L. Ed. 411, it was said:

> "An estoppel, it is said, should be certain to every intent, and therefore, if a thing be not directly and precisely alleged, it shall not be estopped."

So also in Philadelphia, Wilmington R. R. vs. Howard, 13 Howard, 307, 14 L. Ed. 157:

> "If a party has an opportunity to plead an estoppel and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel, and commits the matter to the jury, who are to find the truth."

In Capital Lumber Company vs. Barth, 33 Mont. 94, 81 Pac. 994, it is said:

> "It is the general rule that matter of estoppel, to be effective, must be alleged. Where, however, there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged. In Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372, it is said: 'It is no doubt true that where the party has an opportunity to plead the estoppel he is bound to do it, and if he omits it the jury will not be bound by the estoppel, but may find according to the fact. If, however, there has been no opportunity to plead the matter as an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases where it is pleaded."

Also in Eisenhauer vs. Quinn, 36 Mont. 368, 93 Pac. 38:

> " ' "It is no doubt true that where the party has an opportunity to plead the estoppel he is bound to do it, and if he omits it, the jury will not be bound by the estoppel, but may find according to the facts. If, however, there has been no opportunity to plead the matter of an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases where it is pleaded. This is according to the current of the authorities, though they may not have been entirely uniform".' However effective an estoppel might have been, if pleaded and proved, it is not available to Eisenhauer in this instance, since he did not plead it."

The foregoing rule is consistently adhered to in the Montana decisions:

Conrow vs. Huffine, 48 Mont. 437, 138 Pac. 1094

Colwell vs. Grandin, 64 Mont. 518 210 Pac. 765

Shipler vs. Potomac Copper Co., 69 Mont. 86, 220 Pac. 1097

Scott vs. Prescott, 69 Mont. 540, 223 Pac. 490

Pue vs. Lewis & Clark County, 75 Mont. 207, 243 Pac. 573

Scott vs. Jardine Gold Co., 79 Mont. 485, 257 Pac. 406

Willard vs. Campbell, 91 Mont. 493, 11 Pac. (2d) 782

Middle States Oil vs. Tamer Jones Co., 73 Mont. 180, 235 Pac. 770

Plaintiff can not fall back on the rule that no estoppel need be pleaded unless there is an opportunity to plead it. Plaintiff pleaded the highway construction contract (R 4-28) and the liability policy (R 5-29). The policy contained the exclusions and because plaintiff failed to plead them in haec verba, defendant, after motions to dismiss, pleaded the exclusions affirmatively. Plaintiff might have replied, or moved for judgment on the pleadings based on estoppel, or might have made proof to justify the trial court in holding in favor of plaintiff because of estoppel. None of these things was done and the whole question of estoppel was entirely omitted from the pleadings, proof or findings in these cases until the Circuit Court of Appeals included it in its decision. Thus the defendant was precluded from making any defense on the question.

It cannot be said that defendant waived its defense against estoppel for the charge was never made against it. Neither can it be said that there was no sound defense. Defendant could have proven that it furnished a standard form policy, which becomes material in the light of the decision of the Circuit Court of Appeals when it says:

"There is not even a showing that the policy appelant wrote in this instance was a standard form in general use . . . . "

Defendant could have shown both in fact and in law that it made no representation to Roberta or Marguerite Doheny; that they did not rely and could not have relied upon any representation or conduct of defendant, and that they could not have suffered any detriment or disadvantage by reason of anything said or done by defendant either to them or to the Highway Commission, or to Coverdale & Johnson.

There are no statutes in Montana, or rules of the Highway Commission requiring the furnishing of public liability insurance, upon which members of the public could rely as a representation as to the form of the insurance and since the Highway Commission prescribed no form (testimony of Secretary Whipps (R115)) there could not possibly have been any representation either to the public or the Highway Commission.

The United States Supreme Court has taken jurisdiction in a few cases in the matter of interpretation of the Rules of Civil Procedure:

Sibbach vs. Wilson & Company, 85 L. Ed. 479, 312 U. S. 1

The cases are more numerous in the Circuit Court of Appeals although none has been found directly on the question of estoppel under Rule 8(c):

Bridges vs. Dahl (6th C. C. A.) 108 Fed (2d) 228

Carpenter vs. B. & O. R. R. (6th C. C. A.) 109 Fed (2d) 374

However, in Nakdimen vs. Baker (8th Circuit) 111 Fed. (2d) 778, it is held that a waiver must be pleaded under the rule and likewise that no estoppel existed.

Nakdiemen vs. Baker, 111 Sed. (2d) 782.

It is therefore urged at this point that this Court ought to take jurisdiction because it is of particular importance during the present formative stage of practice under the New Rules of Civil Procedure that an important question of interpretation be finally decided by the court of last resort.

III.

The significance of this decision of the Circuit Court of Appeals is not entirely clear at first impression so the attention of the Supreme Court is now directed at the whole question of the effect and probable consequence if the decision should become the law. For the information of the Supreme Court and to demonstrate the significance of the entire matter an examination has been made of a number of standard contract specifications in general use by the United States Government and other public contracting agencies and it is found that the following standard specifications are generally included in or attached to construction contracts:

1. From contract of November 17, 1941, for construction of an aluminum plant at Spokane, Washington, the owner being the *Aluminum Company of America* acting for and on behalf of *Defense Plant Corporation*, a corporation created by *Reconstruction Finance Corporation* pursuant to Section 5d of the *Reconstruction Finance Corporation Act*, as amended, to aid the *Government of the United States* in the National Defense Program:

"CONTRACTOR shall, during the progress of the work, maintain (a) WORKMEN'S COMPENSATION INSURANCE for all of its employees employed at the site of the work, or if such insurance is not required by the laws of the state wherein the work is to be performed, EMPLOYER'S LIABILITY INSURANCE; (b) CONTRACTOR'S PUBLIC LIABILITY INSURANCE; and (c) AUTOMOBILE LIABILITY INSURANCE.

"The limits of liability provided in each such liability insurance policy shall not be less than $20,000 for injuries, including accidental death, to any person, and, subject to the same limit for each person, not less than $40,000 for any one accident involving two or more persons. AUTOMOBILE LIABILITY INSURANCE shall also provide a property damage limit of not less than $5,000 covering all owned and rented equipment which is used in or on the work.

"Should all or any part of the contract be sublet, CONTRACTOR shall, in addition to the foregoing types of insurance, maintain CONTRACTOR'S PROTECTIVE LIABILITY INSURANCE in an amount not less than $20,000 for injuries, including accidental death, to any one person, and, subject to the same limit for each person, not less than $40,000 for any one accident involving two or more persons; except that CONTRACTOR'S PROTECTIVE LIABILITY INSURANCE need not be maintained to the extent that in any cost-plus contract between CONTRACTOR and a subcontractor, the subcontractor maintains WORKMEN'S COMPENSATION or EMPLOYER'S LIABILITY INSURANCE and CONTRACTOR'S PUBLIC LIABILITY INSURANCE and AUTOMOBILE LIABILITY INSURANCE, as above set forth, and provided CONTRACTOR is named as an additional insured in such policies of insurance.

"Certificate of all such insurance, together with certificates from the insurance companies that they will not cancel the insurance until they have given Agent at least ten (10) days' prior written notice thereof, shall be filed with Agent prior to the commencement of work hereunder."

2. United States Bureau of Public Roads: Federal Works Agency of the Public Roads Administration. State of Montana, Project SN 8-N1, O, Clark Fork River Bridge:

"In addition to any other forms of insurance or bonds required under the terms of the contract and specifications, the contractor will be required to carry insurance of the following kinds and amounts:

"1. Contractors' Public Liability and Property Damage Liability Insurance.

"The contractor shall furnish evidence to the United States Public Roads Administration that, with respect to the operations he performs, he carries regular Contractors' Public Liability Insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of bodily injuries to or death of one person, and subject to that limit for each person, a total limit of Fifty Thousand Dollars ($50,000) for all damages arising out of bodily injuries to or death of two or more persons in any one accident, and regular Contractors' Property Damage Liability Insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of Fifty Thousand Dollars ($50,000) for all damages arising out of injury to or destruction of property during the policy period.

"If any part of the work is sublet similar insur-

ance shall be provided by or in behalf of the subcontractors to cover their operations.

"2. Contractors' Protective Public Liability and Property Damage Liability Insurance.

"The contractor shall furnish evidence to the United States Public Roads Administration that, with respect to the operations performed for him by subcontractors, he carries in his own behalf regular Contractors' Protective Public Liability Insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of bodily injuries to or death of one person, and subject to that limit for each person, a total of Fifty Thousand Dollars ($50,000) for all damages arising out of bodily injuries to or death of two or more persons in any one accident, and regular Contractors' Protective Property Damage Liability Insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of Fifty Thousand Dollars ($50,000) for all damages arising out of injury to or destruction of property during the policy period.

"3. Railroads' Protective Public Liability and Property Damage Liability Insurance.

"In addition to the above, he shall furnish evidence to the United States Public Roads Administration that, with respect to the operations he or any of his subcontractors perform, he has provided for and in behalf of the Northern Pacific Railway Company regular Protective Public Liability insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of bodily injuries to or death of one person, and, subject to that limit for each person, a total limit of Fifty Thousand Dollars ($50,000) for all damages

arising out of bodily injuries to or death of two or more persons in any one accident, and regular Protective Property Liability insurance providing for a limit of not less than Fifteen Thousand Dollars ($15,000) for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of Fifty Thousand Dollars ($50,000) for all damages arising out of injury to or destruction of property during the policy period."

3. United States Indian Irrigation Service. Crow Irrigation Project on Crow Reservation, Montana, R. P. England, Contractor:

"30. *Compensation Insurance.* The contractor shall provide adequate workmen's compensation insurance for all labor employed on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the contracting officers shall be given."

4. United States Public Works Administration. Regional Manual of Instructions, revised September 15, 1938, at Omaha, Nebraska:

"2. *Contractor's Insurance.* The Contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the Contractor allow any Subcontractor to commence work on his subcontract until all similar insurance required of the Subcontractor has been so obtained and approved."

"(b) *Public Liability and Property Damage Insurance.* The Contractor shall take out and maintain during the life of this contract such Public Lia-

bility and Property Damage Insurance as shall protect him and any Subcontractor performing work covered by this contract, from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any Subcontractor or by anyone directly or indirectly employed by either of them and the amounts of such insurance shall be as follows:

"Public Liability Insurance in an amount not less than $..... for injuries, including accidental death to any one person, and subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

"The Contractor shall require Subcontractors, if any, not protected under the Contractor's insurance policies to take out and maintain insurance of such nature in the following amounts:

	Public Liability Insurance	Property Damage Insurance
On Subcontracts less than $1,000	.....	.....
On Subcontracts $1,000 - $5,000	.....	.....
On Subcontracts $5,000 - $20,000	.....	.....
On Subcontracts $20,000 - $50,000	.....	.....
On Subcontracts $50,000 and over	.....	.....

"(c) *Insurance Covering Special Hazards.*

The following special hazards shall be covered by rider or riders to the Public Liability and/or Property Damage Insurance policy or policies herein elsewhere required to be furnished by this Contrac-

tor or by separate policies of insurance, in amounts as follows:

"3. *Proof of Carriage of Insurance.* The Contractor shall furnish the Owner with satisfactory proof of carriage of the insurance required."

5. Helena (Montana) High School, Public Works Administration Project Number 2603, April 1934:

"VII-50—CONTRACTOR'S LIABILITY INSURANCE:

"The contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and from any other claims for damages for personal injury, including death, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. Certificates of such insurance shall be filed with the owner, if he so require, and shall be subject to his approval for adequacy of protection."

6. Montana State Water Conservation Board. Public Works Administration Docket No. 1167-F, Montana (still under construction:

"(b) *Public Liability and Property Damage Insurance.* Each contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or by any one directly or indirectly employed by either of them and the amounts of such insurance shall be as follows:

"Public Liability Insurance in an amount not less than $10,000 for injuries, including accidental death, to any one person, and, subject to the same limit for each person, in an amount not less than $20,000 on account of one accident, and Property Damage Insurance in amounts not less than $5,000.

"The contractor shall require subcontractors, if any, not protected under the contractor's insurance policies to take out and maintain insurance of such nature in the following amounts:

	Public Liability Insurance	Property Damage Insurance
On subcontracts less than 1,000	$10,000/$20,000	$1,000
On subcontracts $1,000 - $5,000	$10,000/$20,000	$1,000
On subcontracts $5,000 - $20,000	$10,000/$20,000	$1,000
On subcontracts $20,000-$50,000	$10,000/$20,000	$1,000
On subcontracts $50,000-and over	$10,000/$20,000	$5,000

7. Greybull Valley Irrigation District Park and Bighorn Counties, Wyoming, Sunshine Reservoir Dam.

"The Contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the Contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved."

"b. *Public Liability and Property Damage Insurance.* The Contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered

by this contract, from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or by anyone directly or indirectly employed by either of them and the amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $50,000 for injuries, including accidental death, to any one person, and subject to the same limit for each person, in an amount not less than $100,000 on account of one accident, and Property Damage Insurance in an amount not less than $5,000.

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such sub-contractor."

8. *Specifications for construction of Roads and Bridges in national forests and national parks, 1941, Federal Works Agency—Public Roads Administration Article 7.1:*

"Workmen's Compensation Insurance: The contractor shall obtain workmen's compensation insurance in accordance with the requirements of the laws of the State in which the work is to be performed in case the constituted authority of such State shall apply such laws to this project. In the event such laws do not apply to the project, the contractor shall provide workmen's compensation insurance equal at least to that required by the laws of the State for other work. In those States where there are no workmen's compensation laws the contractor shall

provide, workmen's compensation insurance at least equal to that ordinarily carried for work of this kind performed for the United States Government in that section of the country, which insurance shall be subject to the approval of the engineer, and shall provide for payments to workmen in case of temporary or permanent disability resulting from the work provided for herein and for payments to their dependents in case of death."

From the foregoing it is apparent that many, if not all, of the contracting agencies of the United States, and also many of the public contracting agencies in Montana as well as other states, such as irrigation districts, school boards, highway commissions and numerous others, require contractors on public works to carry liability insurance. The contract requirements appear to be more or less uniform and in most cases the contractor must notify the contracting agency that such insurance is being carried. All of such contracts require a performance bond. So, if under these circumstances, the provisions of the public liability policy are to be disregarded, and if the provisions of the contract specifications are to become the basis of the liability to the general public, whether by reason of estoppel, or upon the general proposition that the general contract specifications must be construed so as to make the limitations in the liability policy inapplicable, there must be, throughout the United States, almost innumerable public liability policies issued and outstanding under a unanimous misunderstanding of the law. *It seems impossible to place too much emphasis on the fact that by this decision every member of the general public acquires privity and thus becomes entitled to*

the benefit of an indemnity to which he was a total stranger.

Furthermore, while the instant cases were founded upon negligence, the contract specification provisions in practically all cases, including the instant cases, are so broad as to amount to a requirement of general indemnity to the general public irrespective of negligence:

> "The contractor shall carry public liability insurance to indemnity the public for injuries or damages sustained by reason of the carrying on the work." (R 86).

It is most respectfully submitted that to secure uniformity of decision, and in the public interest this question is of such importance that it ought to be decided by the court of last resort as was done in:

Del Vecchio vs. Bowers, 296 U. S. 280, 80 L. Ed. 229.

ARGUMENT.

1. As heretofore pointed out estoppel should have been pleaded and proven if to be relied upon under the Rules of Civil Procedure.

2. However, even if the pleading is held sufficient no estoppel in fact existed.

The elements of estoppel are: (1) Conduct which amounts to a false representation, or the concealment of a material fact, inconsistent with the fact which the party subsequently attempts to assert; (2) intention or expectation that such representation will be acted upon by the other party; (3) actual or constructive knowledge of the real facts; (4) lack of knowledge or the means of knowl-

edge in the other party, who; (5) relies up the representation; (6) to his detriment or disadvantage.

19 American Jurisprudence page 643.

The leading case on the subject, decided by the United States Supreme Court is Dickerson vs. Colgrove, 100 U. S. 578, approved in:

Kirk vs. Hamilton, 102 U. S. 79

Drexel vs. Berney, 122 U. S. 240 30 L. Ed. 1219

Wehrman vs. Conklin, 155 U. S. 314 39 L. Ed. 167

Illinois Surety vs. John Davis Co. 244 U. S. 376 61 L. Ed. 1206

Sanders vs. Browne (Court of Patent Appeals) 117 Fed. (2) 547 at page 559.

United States vs. Georgia Marble Co. (Fifth Circuit) 106 Fed. (2) 955.

The cases are practically all in harmony in defining estoppel as above. In Montana the law is the same:

"Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such a belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it." (Revised Codes Montana, 1935).

Waddell vs. School District No. 2, Yellowstone County, 74 Mont. 91, 238 Pac. 884.

Lindblom vs. Employers Liability Assurance Co. 88 Mont. 488, 295 Pac. 1007.

Scott vs. Jardine Gold Mining & Milling Co., 79 Mont 485, 257 Pac. 406.

Mitchell vs. Banking Corporation of Montana, 95 Mont. 23, 24 Pac. (2d) 124.

In re McGovern's Estate, 77 Mont. 182, 250 Pac. 812.

Peterson vs. School District No. 1, Cascade County, 73 Mont. 442, 236 Pac. 670.

Moore vs. Sherman, 52 Mont. 542, 159 Pac. 966.

Estoppel operates only on the parties and their privies.

Van Renesselear vs. Kearney, 11 Howard 297, 13 L. Ed. 703.

State ex rel Finley vs. District Court, 43 Pac. (2d) 682, 99 Mont. 200.

Braithwaite vs. Harvey, 36 Pac. 38, 14 Mont. 208.

Assuming that the defendant in these actions, by writing the Highway Commission that it had written the public liability policy, might be estopped from later denying that fact in an action against it by the Highway Commission, certainly no representation was made to the general public and obviously no person would submit to an automobile accident in reliance upon the existence of a liability policy, especially when knowledge of the existence of the policy could not possibly have been communicated to him, and this is particularly true in the light of the testimony of Mr. Whipps, Secretary and Administrative Engineer of the Highway Commission who testified (R 115) that the Commission had never prescribed the form of the policies in such cases and had never called for submission of such policies to it.

DECISION OF CIRCUIT COURT OF APPEALS

It cannot be maintained that the Circuit Court of Appeals affirmed the trial court on any theory except estoppel. The opinion does not cite one single authority. It does refer to two sections of the Montana Code neither of which justifies the decision. Section 10521 Revised

Codes of Montana, 1935, is the general statute providing that in construing an instrument the court may resort to extraneous circumstances, such as the situation of the parties and the subject matter but it does not serve as a means of modifying an unambiguous contract so as to delete distinct and important parts thereof especially for the benefit of one who was never a party to it.

Likewise Section 7528 Revised Codes of Montana, 1935, cited by the Circuit Court of Appeals is applicable only in the case of ambiguity. If any section of the Montana code is applicable it is Section 7529 which provides that if the language of a contract is clear and explicit and does not involve an absurdity, the interpretation must be as expressed in the contract.

Circuit Judge Haney in the concurring opinion agrees in part with the views expressed in this brief. He concluded that there could be no estoppel, except possibly in an action by the State of Montana. He thought that the judgment should be affirmed on the ground that recovery should be had on the performance bond, but this could not be accomplished by reason of the decision in:

> *The case of National Surety Company of New York vs. Ulmen; 68 Fed. (2) 330: Certiorari Denied, 78 L. Ed. 1479.*

Surprisingly the Ulmen case was not referred to in the decision of the Circuit Court of Appeals. Nevertheless it is in point and contrary to the decision in these cases.

Ulmen was injured when the automobile in which he was riding went through a barricade on a highway construction job in Montana. He sued the contractor and

recovered but was unable to collect his judgment. There upon he sued National Surety Company which had written the performance bond.

The contract between the contractor and the State of Montana had a specification requiring the contractor to

> "provide, erect and maintain all necessary barricades, suitable and sufficient red lights, warning and danger signals and signs, provide a sufficient number of watchmen and take all necessary precautions for the protection of the work and the safety of the public."

Ulmen contended that since the performance bond provided that:

> "the contractor shall in all respects comply with the contract, and his . . . obligations thereunder including the specifications therein referred to . . . and shall save harmless the State of Montana . . . from any damages growing out of the carelessness of said contractor . . . . "

the Surety Company was liable to him on its bond.

The Circuit Court of Appeals refused to enlarge the provisions of the bond and held that since the performance bond contained no provision for *payment* for damages in tort actions, but only payment for labor and materials, no recovery could be had on the bond by Ulmen.

So in the case at bar, the public liability policy, while containing a general provision for payment, specifically excludes automobiles elsewhere than at the immediate site of the work and there is no more justification for broadening that provision in the policy than there was for reading the word "payment" into the performance bond in the Ulmen case.

The two decisions cannot be reconciled. The general provisions in these public contracts should not be construed, either by estoppel or otherwise, to extend the rights of the general public beyond the limits of either the performance bond or the liability policy.

The entire structure of these public contract documents is here involved throughout the United States.

CONCLUSION

It is most respectfully submitted:

1. That this Court ought to take jurisdiction of this case and that a decision should be rendered on the merits to the end that Rules 8(c) and 12(h) of the Rules of Civil Procedure for the United States District Courts may be finally interpreted and so that the very important question as to the meaning of the contract specifications and public liability insurance policies and performance bonds of the character here involved may be settled.

Respectfully submitted.

John E Patterson

Attorney for the Petitioner.

Howard Cooley

W. F. Brown

Of Counsel for Petitioner.

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BRIEF OF

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IN THE SUPREME COURT OF THE UNITED STATES

No.....

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Petitioner,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of ROBERTA DOHENY, Deceased,

Respondent,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Petitioner,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of MARGUERITE DOHENY, Deceased,

Respondent.

BRIEF OF RESPONDENT

I

Statement of the Matter Involved

Deeming the outline in the Summary Statement of the Matter Involved, appearing in the petition for certiorari, too narrowly confined as to matters of record to which

the Court's attention should be directed we submit the following additional facts.

The contract, between the State of Montana and Coverdale and Johnson, contained, among others, the following provisions (R. Vol. 1 p. 82):

"It should be understood thoroughly by all concerned that all things contained herein, together with the 'Advertisement for Proposals' or 'Notice to Contractors,' and the 'Contract Bond,' as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these Specifications and Contract, and are to be considered one instrument."

The contract and surety bond for performance were sent to Coverdale & Johnson to be executed in a letter (Exhibit 3) from the State Highway Commission (R. Vol. 1, pp. 109-111) which reads:

September 26, 1934

USPWH Projects NRH-176 E, U 2 (1935)
and NRH-275 A, Unit 2 (1935)

Coverdale & Johnson,
c/o John M. Coverdale,
416 West Park Avenue,
Anaconda, Montana.

Gentlemen:

There are enclosed herewith two original numbers and two copies of your contracts for U. S. Public Works Highway Projects NRH-176 E, Unit 2 (1935) and NRH-275-A, Unit 2 (1935). In connection with each contract, please have the two originals of the contract and contract bond executed by both members of your firm, signing on the lines checked and having your signature witnessed by two persons. In each case, have the two originals of the (96) contract bond executed by your surety company. Then return the two originals for each project

to this office for execution by the Chairman of the Highway Commission. Your original numbers will be returned to you after final execution and approval.

In furnishing your surety bonds, the requirement set forth in Paragraph 3.4, page 4, of the Standard Specifications included in these contracts must be fully complied with, and the certificate referred to must be attached to the Highway Commission's original copy of the bond, which bond is bound in at the back of the contracts.

The copy of the contract marked for the contractor in each case is being furnished in accordance with Article 5.5 of the Standard Specifications. In conformity with this Article, it is expected that the contractor shall keep this copy continuously on the job. The second copy of the contract for each project is intended for the files of your bonding company.

You are reminded of the clause, which is included in Article 7.11, Page 11, Section 7 of the Standard Specifications, providing that you shall carry public liability insurance. The Commission has ruled that no payment on account of these contracts will be made until this office has been furnished with satisfactory information to the effect that this insurance has been taken out by you. Preferably, this information should be conveyed in the form of a letter to this department from the insurance agent who furnishes you the policy. Until this provision is complied with no payment can be made under the contracts.

Very truly yours,
STATE HIGHWAY COMMISSION,
By W. O. Whipps,
Administrative Engineer.

W-mo
Encls.

The United States Fidelity & Guaranty Company returned the executed surety bond to the State of Montana in the letter appearing on page 7 of the petition for certiorari, but neither the public liability insurance

policy referred to in the letter nor any copy thereof was ever furnished to the State Highway Commission (R. Vol. 1 pp. 114, 115).

The bond constituting part of the contract and executed by the contractors and the petitioner surety company was expressly conditioned for the faithful performance by the contractors of the entire contract inclusive of the provision requiring the carrying of liability insurance to "indemnify the public for injuries or damages sustained by reason of the carrying on the work" (R. Vol. 1, pp. 99-102).

The petitioner was paid the premium charges for writing both the surety bond and the liability insurance policy.

The insurance policy in specifying the immediate places where the contractors were carrying on their operations described same as "Unit No. 2, being construction of concrete and timber pile bridges Augusta-Sun River Road, Lewis and Clark County, Montana, and elsewhere in the State of Montana" (R. Vol. 1, p. 148).

The deceased girls' injuries and deaths were sustained at a point on Augusta-Sun River Road by reason of the carrying on of the work by the contractors within the insurance provision requirement of the highway contract for the improvement of such road and which insurance provision appears on page 6 of the petition for certiorari.

Prior to commencement of these actions in the District Court below, the administratrix, through her attorney, attempted to obtain access to the liability insurance policy to enable her to plead the facts, but the contractor Coverdale stated the policy had been lost (R. Vol. 1, pp. 124,

125), and the insurer company first refused and upon being notified that the respondent would compel the production of a copy by legal proceedings a copy of the daily report was furnished and in the letter accompanying the copy of the daily report the petitioner stated it was not possible to furnish an exact copy of the policy (R. Vol. 1, pp. 121-124, 128). The original policy and its contents were first fully disclosed (Exhibit 27) at the trial (R. Vol. 1, pp. 132-163) as defense evidence.

The statements appearing at page 9 of the petition for certiorari that "Estoppel was never pleaded or relied upon" and that "Estoppel was injected into the case for the first time in the decision of the Circuit Court of Appeals and appellant was never given any opportunity to meet it" undoubtedly are the result of oversight and misapprehension upon the part of the petitioner as to what the record discloses.

The facts which support an estoppel appear in the pleadings and in the evidence not objected to by the petitioner in the trial court and was alluded to in the opinion of the trial court and will be hereinafter particularly considered in discussing the legal questions proposed by the petition and brief of the petitioner.

II

Legal Questions

Summarized, the legal propositions urged by the petitioner for grant of a writ of certiorari under section 240 of the Judicial Code, 28 U. S. C. A. 347 and Rule 38, subdivision 5 of the rules of this Court, substantially are;

1. The Circuit Court of Appeals affirmed the judgments of the District Court on the ground of an estoppel which was not pleaded, nor proved, nor was available to the respondent. (Petition, pages 20-26).

2. The exclusions in the liability policy operated to relieve petitioner company from all liability. (Petition, page 20).

3. That the basis of the minority opinion in the Circuit Court conflicts with a prior decision of that Court and which this Court declined to review. (Petition, pages 38-41).

We shall discuss these contentions in the foregoing order.

Estoppel

1. Estoppel sufficiently pleaded.

Each of the complaints in the causes substantially allege the facts of the making of the contract between the State of Montana and Coverdale and Johnson, contractors, for the improvement of the Augusta-Sun River public highway, the provisions thereof requiring the furnishing of the performance bond for faithful performance of the contract and the carrying by the contractor of public liability insurance with a liability coverage "to indemnify the public for injuries or damages sustained by reason of the carrying on the work" under the contract and for the furnishing of evidence of taking out such public liability insurance (R. pp. 4-6, 28-29). The complaints further allege that subsequently the United States Fidelity Company notified the Montana Highway Commission that it had issued contractors' public liability insurance policy for said contractors under said contract,

that plaintiff (respondent here) had demanded the original or a copy of said public liability insurance policy from the contractors and from the United States Fidelity and Guaranty Company and that said persons failed and refused to furnish either and that "plaintiff is informed and believes and therefore alleges that under the provisions of said insurance policy and in accordance with the provisions of the agreement between the said co-partners and the State of Montana the defendant corporation promised and agreed to pay all claims for liability imposed upon the aforesaid co-partners by law for damages on account of bodily injuries including death at any time resulting therefrom sustained by any of the public by reason of the carrying on of the work mentioned and described in the contract between said co-partners and the State of Montana in connection with the public highway mentioned in said contract" (R. pp. 6, 29, 30). The complaints then set forth the injuries and deaths sustained by the deceased girls by reason of the gross negligence of the contractors in carrying on the work under the contract, subsequent suits, judgments in state courts and affirmance on appeal by the State Supreme Court, nonpayment, executions returned, participation by United States Fidelity and Guaranty Company in the conduct of the defenses in the state courts, notice and demand for payment on that company and nonpayment (R. pp. 7-10, 30-33). The Court will note from the facts alleged that at the time the complaints were drawn the plaintiff had been denied access to the original policy by the contractors on the representation that the same was lost (although it later showed up at the trial

as a part of the defense evidence (R. pp. 124, 125, 132-163) and had been denied a copy which the insurer company would vouch for as being a true copy, although a copy of the daily report was furnished, upon threat of a court order (R. pp. 121-124, 128), but with the qualifying statement of the insurer by letter that it was "not possible for us to give you an exact copy of the policy which was issued." (R. p. 123-124). The plaintiff assuming that the policy conformed to the requirements of the highway contract which fixed the measure of liability of the insurance policy thereunder alleged substantially such liability on the part of the insurer, and did not refer to any exclusions in the policy. The answers of defendant (petitioner), notwithstanding it had participated therein and had complete information and knowledge concerning the actions against Coverdale & Johnson in the state court, the trials, judgments and affirmance thereof on appeal (R. pp. 165-168), denied it had such information and knowledge (R. pp. 56, 59, 60) thereby requiring the plaintiff at the trial of these causes to introduce in evidence the entire judgment rolls of such cases in the present causes when tried below (R. Vol. 11, pp. 66, 67, 241-458). The answers also alleged the exclusion clauses of the policy quoted at page 6 of the petition herein (R. pp. 55, 56, 59).

The petitioner contends that since the respondent (plaintiff) below failed to reply the question of estoppel cannot be considered in these causes, relying on Rules 8 (c) and 12 (h) of the Rules of Civil Procedure and overlooking other pertinent sections of the rules.

Rule 7 (a) in so far as pertinent prescribes the plead-

ings allowed as "a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such" * * * "No other pleading shall be allowed, except that the court may order a reply to an answer." It is not and could not be contended that either of the answers herein contain a "counter claim denominated as such," since none such appears therein (R. pp. 55-61). The Court did not make any order requiring a reply nor did the petitioner at any time request the Court for such an order. Hence, plaintiff was not required to file a reply.

Rule 12 (h) relative to waiver of defenses and objections must be read with subdivision (b) of the same rule which provides for defenses to "a claim for relief in any pleading" to "be asserted in the responsive pleading thereto if one is required" and which also provides—"If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or in fact to that claim for relief."

Rule 8 (c) must be read with Rule 8 (d) which provides—"Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

No responsive pleading to the answer being required of plaintiff she could avail herself of any matters in avoidance of the averments of the answer warranted by the evidence.

Independent of the provisions of the rules referred to the facts constituting estoppel sufficiently appear in the pleadings. Briefly the complaints, respectively, allege the

facts concerning the highway contract, the performance bond, the contractual requirement for carrying liability insurance to indemnify the members of the public for injuries and damages sustained by reason of the carrying on of the work under the highway contract, the written representation by the insurer that it had issued public liability policies under the highway contract, the injuries and deaths sustained by reason of carrying on the work, the judgments, executions returned unsatisfied, affirmance of judgments on appeal, demands for payment and non-payment (R. pp. 3-15, 26-38). The facts among others upon which the lower appellate court's majority opinion was based are that the insurer company wrote the performance bond for faithful performance of the provision for public liability insurance and thereupon undertook to perform such a provision for a monetary consideration, and notified the State of Montana in writing that it had issued an insurance policy in accordance with the requirements of the contract, whereby the contractor obtained the benefits of the contract, and instead of the policy written conforming to the liability prescribed it contained an exclusion from liability, incompatible with the liability prescribed in the highway contract. These facts, with the exception of the writing of the limited liability policy containing the exclusion clauses, are alleged in the complaint (R. pp. 4-6, 27-30) and admitted by the answers (R. pp. 55, 58, 59). The defendant alleged in its answer the exclusion provisions of the policy (R. pp. 55, 56, 58, 59) and at the trial introduced the policy showing the exclusion clause as part of its defense (R. pp. 132, 134, 154, 155).

Any failure to allege in the complaint the fact as to the policy containing the exclusion clause was cured by the allegations of such fact in the answers and the introduction in evidence of such exclusion clause by the petitioner, the rules being that omissions and defects in a complaint may be supplied and cured by answer or by introduction of evidence of facts without objection made.

Texas & N. O. R. R. Co. et al. v. Fannie Miller, et al.,
221 U. S. 408, 55 L. ed. 789, 795;

In re Miller's Estate,
71 Mont. 330, 337, 229 Pac. 851;

Schmidt v. United States,
(C. C. A. 8th) 63 F (2d) 390.

The pleadings and evidence raised the question of estoppel in the trial court and the principle was expressly presented to that court on pages 14 and 15 in the brief of plaintiff submitted to that court prior to judgment (See appendix hereto). Rule 15 (b) Federal Rules of Civil Procedure provides for amendments of pleadings to conform to the evidence but failure to amend does not affect the trial of issues presented by the evidence. The rule further provides that even where objection is made to evidence as not being within the issues made by the pleadings amendments should be allowed when the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense and the court may grant a continuance to enable the objecting party to meet such evidence.

In the causes at bar petitioner made no showing or representation that it was prejudiced in its defense nor did it ask for any continuance to present additional evi-

dence nor did it petition the trial court for a rehearing or a new trial, nor move the court to reopen the case to put in any additional evidence.

It is a rule well established, in Federal Courts, that where evidence is admitted of issues not pleaded but the appealing party either failed to object to its admission or failed after objection to show substantial prejudice to the trial court this Court on appeal or certiorari will not disturb the judgment of the lower Court if the judgment was right on the merits, and the pleadings will be deemed amended to conform to the proof.

Sec. 269 Judicial Code,
28 U. S. C. A. Sec. 391;

Business Mens Assur. Co., v. Campbell,
(C. C. A. 8th) 32 F. (2d) 995,
Certiorari denied, 280 U. S. 594, 74 L. ed. 642;

Norton v. Larney,
266 U. S. 511, 69 L. ed. 413, 416.

In view of the provisions Rules 7 (a), 8 (d), and 12 (b) of the Federal Rules of Civil Procedure, referred to at pages 8, 9, ante, made applicable to cases removed from state courts to United States District Courts by Rule 81 (c), and by virtue of which no reply was required of plaintiff below, the discussion and citations of authority appearing at pages 22 to 25 of the petition herein are not pertinent. However, even if above rules 8 (d) and 12 (b) had not been in effect the courts are in agreement that in jurisdictions requiring a reply only where a counter-claim is pleaded in the answer, matters of estoppel may be established by the plaintiff without a reply as in such cases it is deemed that plaintiff has had no opportunity to plead the estoppel within the rule

that where a party has not had an opportunity to plead an estoppel evidence establishing same is properly admissible.

Baierly v. Riesenecker,
201 Wis. 459, 230 N. W. 605;

Calif. Breeders Assn. v. Showers,
86 Cal. App. 239, 260 Pac. 955;

The Philadelphia etc. R. R. Co. v. Howard,
13 How. 307, 14 L. ed. 157;

See 120 A. L. R. p. 76 where decisions are collected.

Where a defendant proceeds to trial without questioning the failure to reply he is deemed to have waived such failure of the other party.

Hooper v. First Exchange Nat'l Bank,
(C. C. A. 9th) 53 F (2d) 593.

On page 24 of the petition it is stated that defendant could have proven that it furnished a standard form policy. We do not believe such fact would defeat the right of recovery in this case. The statutes of Montana do not provide for a standard form of public liability insurance. The provision of the highway contract does not specify that a standard form of policy should be furnished. On the contrary it requires an insurance liability of a stated character and does not admit of exclusions in such policy which would defeat the purpose of the requirement. In addition to such requirement the petitioner herein failed to apprise the State Highway Commission that the policy written did not conform to the liability coverage required by the contract, nor did it exhibit the original policy or a copy thereof to the Commission. On the contrary by letter (R. pp. 113, 114) the petitioner represented it had issued a public liability policy under

the contract with a $20,000.00 liability limit. The same petitioner had executed the performance bond whereby it had obligated itself to the performance by the contractor of all of the provisions and conditions of the highway contract. On the strength of this letter the contractors received the benefit of the contract and the insurer received the benefit of the premium payment. Having received the benefit it should be required to assume the contractual insurance liability.

Section 8750 Rev. Codes of Montana, 1935.

Krpan v. Central Ins. Co.,
87 Mont. 345, 287 Pac. 217.

Before proceeding with discussion of other legal points which deny the right of petitioner to a writ of certiorari we respectfully direct the attention of the Court to the statement on page 12 of the petition, paragraph 1, that the Circuit Court was in error in holding for the first time on appeal that petitioner was estopped from relying upon the exclusions in the policy because not raised below or relied upon by plaintiff. The excerpts from brief of plaintiff in the trial court appearing in the appendix hereto will disclose that estoppel was urged to the trial court and a reference to the opinion of the trial court (the nine lines on bottom of page 181 and first seven lines on page 182 of the record) will show that the trial court predicated decision on the principle of estoppel of defendant to rely on the exclusion provisions of the policy antagonistic to the highway contract. The mere fact that the court did not use the word "estoppel" does not alter the principle involved. And the further fact that as a further ground of decision the court held that the policy

should be read as one with the agreement and the bond together with the evidence (R. p. 184) in arriving at the intention of the parties does not eliminate the principle of estoppel from the case.

In view of section 10605, subd. 3, Revised Codes of Montana, quoted on page 37 of the petition and the decisions cited certainly, as impliedly conceded by petitioner, the insurer's conduct was sufficient to render estoppel available as between the State of Montana and the insurer. However, petitioner contends that there being no representation made to the public such estoppel is not available to respondent. Petitioner overlooks the rule that estoppel operates upon and is available to the parties to the transaction and their privies.

19 Am. Jur. Sec. 152, p. 807.

The Supreme Court of Montana in Gary Hay & Grain Co., v. Carlson, 79 Mont. 111, @ 125, 255 Pac. 722, held that where a contract between the State Highway Commission and a contractor for improvements to a public highway contained a provision requiring the contractor to pay all persons furnishing material or performing labor, persons of such class furnishing materials or labor were entitled to maintain an action in their own name against the surety on the performance bond to recover for such materials and labor because where a contract expresses an intention to benefit a class of persons there is sufficient privity of contract between those coming within the class and the surety to support the suit even though the dominant purpose of the bond is the protection of the obligee.

The same court has decided that one who takes a lease

of shares of stock from a shareholder in an irrigation company, where the by-laws authorize the shareholder to lease same, is in privity with the company and may maintain an action to compel said company to furnish water to him.

Hyink v. Low Line Irrigation Co.,
62 Mont. 401, 205 Pac. 236.

In Slavens v. Standard Acc. Co., 27 F (2d) 859, (C. C. A. 9th) on appeal from the United States District Court for Montana, held that where an accident policy for indemnifying members of the public for injuries existed any person of that class after injury was the real person in interest under the contract and could maintain an action thereon.

See also Mourea v. Rhude,
(Minn.) 295 N. W. 304.

Respondent's intestates being members of the class (public) for whom the insurance protection was designed and expressly mentioned as beneficiaries of the insurance provision of the contract estoppel is available to respondent as administratrix.

To deny respondent the benefit of the judgments would result in permitting the insurer to take advantage of its own wrong contrary to Section 8746, Revised Codes of Montana, 1935.

Judgment Correct on the Merits

At the time the contract was made between the contractors and the State of Montana and the United States Fidelity and Guaranty Company executed the performance bond attached to the contract it knew the contract ex-

pressly provided that the formal agreement to which the bond was attached contained the express provision that the agreement and the bond and all supplemental agreements made or to be made were to be considered as one instrument (I. pp. 82, 83). It was presumed also to know that under the law of Montana the bond must be construed with and as a part of the highway contract.

Gary Hay and Grain Co. v. Carlson,
79 Mont. 111, 255 Pac. 722.

It knew that the contractors were expressly agreeing to carry public liability insurance to indemnify members of the public injured by reason of the carrying on of the work, and that it was obligating itself that such provision would be performed. Contemporaneously with the execution of the contract and bond it undertook, itself, to perform such provision of the highway contract and notified the State of Montana by letter that it had performed this particular obligation (R. pp. 113 and 114). It did not inform the State of Montana of any exclusions or limitations of liability. In view of these circumstances the contract, bond, and insurance policy should be read together as parts of substantially one transaction, each aiding the other in determining the true purpose and intent of the instruments, and the measure of liability required to be assumed by the public liability insurer.

The following authorities support this principle of construction.

"A contract may be explained by reference to the circumstances under which it is made and the matter to which it relates."

Sec. 7538 Rev. Code Montana.

"For the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of the parties whose language he is to interpret."

Sec. 10521 Rev. Code Montana.

By virtue of the above statutes the policy is to be construed with reference to the original contract and bond, and in addition the language of the policy is to be interpreted most strongly against the defendant company, who is responsible for the uncertainty.

Sec. 7545 Rev. Code Montana.

"Where several instruments are made at the same time in relation to the same subject matter they may be read together as one instrument and the recitals in the one may be limited by reference to the other. This rule obtains even when the parties are not the same if the several contracts were known to all parties and were delivered at the same time to accomplish an agreed purpose."

Peterson v. Miller Rubber Co.,
(C. C. A. 8th Cir.) 24 Fed. (2) 59;

Union Bank v. Himmelbauer,
57 M. 438, 188 Pac. 940;

Dodd v. Vucovich,
38 M. 188, 99 Pac. 296;

Fidelity & Dep. Co. v. Hershey,
(Colo.) 25 Pac. (2) 178;

Busch v. Hart,
(Ark.) 35 S. W. 534.

"Where several instruments are made as a part of one transaction they will be read together and each will be construed with reference to the other."

13 C. J. Sec. 487 p. 528.

In Gary, etc. Co. v. Carlson, et al., 79 Mont. 111, 255 Pac. 722, held, where a surety bond is given for performance of a contract the bond is made with relation to the contract and as a part of it, the two must be construed together and the surety binds itself to the performance of those acts which the principle promises to perform as a part of his contract and hence where a contractor promised to pay laborers and materialmen and fails to do so they may sue the surety directly on the bond in their own names as a contract made for their benefit as third parties under Section 7472 Rev. Code Montana.

With reference to the construction of insurance policies the following rules are applicable:

"The contract should be construed as a whole together with other papers or documents which constitute a part of the contract; a statutory regulation under the particular employment or acts in respect to which insurance is effected enter into and form a part of the policy and must be read in connection therewith. The policy is construed liberally in favor of the insured and against the insurance company. A liability insurer cannot invoke the strict rules of construction which apply for the protection of gratuitous sureties and narrow technical construction of the policy or of the petition in the former action against the insured for a liability covered by the policy is not permissible to defeat the insurance."

36 C. J. p. 1061, Sec. 14.
Creem v. Fidelity etc. Co.,
126 N. Y. S. 555, modified on other grounds
206 N. Y. S. 733, 100 N. E. 454,

"Where not inconsistent with other parts of the contract or incompatible with the surrounding facts and circumstances or the subject matter every material word should be given meaning and effect. However the

court is justified in ignoring part of the language of the contract where in view of the subject-matter it is meaningless, inapplicable or inoperative or where to give effect it would lead to unreasonable results defeating the manifest intention of the parties and the object and purpose they had in view in entering into the contract."

32 C. J. p. 1158, Sec. 268.

In determining whether a policy covers a liability the policy may be considered in view of the purpose for which it is sought and the result to be accomplished.

Biwabik Concrete Agg. Co. v. U. S. F. & G. Co.,
(Minn.) 288 N. W. 394.

Park Saddle Horse Co. v. Royal Indem. Co.,
81 Mont. 99, 261 Pac. 880.

Williams v. Pac. States Ins. Co.,
(Ore.) 251 Pac. 258.

Where an insurance company at the time of procuring the policy knows facts and circumstances which would render the policy void under a printed clause in the policy later written, it is held that by issuing the policy and accepting the premium the insurer is estopped to deny liability under the said clause in the policy.

Krpan v. Central, etc., Ins. Co.,
87 M. 345, 287 P. 217.

To same effect:
Johnson v. Ins. Co.,
70 M. 411, 226 Pac. 515.

The policy of insurance written in this case was not voluntary insurance, i. e. insurance written without compulsion. It was written under the compulsory insurance requirement of the highway contract, and the circumstances in this case are similar to the situation where for the protection of the public a statute requires in-

surance with a prescribed liability to be carried. In such cases the courts uniformly hold that the pertinent provisions of the statute are a part of the insurance policy and control where the policy provisions differ from the statutory liability.

Ocean Acc. etc., Corp. v. Torres,
91 Fed. (2) 464, 468 (C. C. A. 9th);
Malmgren v. Southwestern Auto Ins.,
(S. C. Cal.) 255 Pac. 512;
Ott v. Fidelity etc., Co.,
(S. C.) 159 S. E. 635, 76 A. L. R. 4;
Corwin v. Salter,
(Wis.) 216 N. W. 653;
Kruger v. Calif. Highway Indem. Co.,
(Cal.) 258 Pac. 602 Certiorari denied
72 L. ed. 430;
Arizona Mut. Ins. Co. v. Bernal,
(Ariz.) 203 Pac. 338;
Stone v. Inter-State Exchange,
(Wis.) 229 N. W. 26;
Opinions of Justices,
(Mass.) 147 N. E. 681.

The principle is discussed in cases referred to in annotation in 85 A. L. R. 28-30.

Protection of the public being the underlying reason both for statutory enactments and the provision in the highway contract in the causes at bar the same rule by analogy should be applied under Section 8740 Revised Codes of Montana, 1935, which provides that where the reason is the same the rule should be the same.

A further reason for construing the insurance policy with the highway contract is the ambiguity or uncertainty as to whether under the terms of the policy the injuries

and deaths of the Doheny girls are within the express coverage of the policy, notwithstanding the exclusion provisions. The accepted rule of construction is that a liability policy must be construed liberally in favor of the insured and strictly against the insurance company.

Commercial Casualty Co. v. Stinson,
111 Fed. (2) 63.

The policy expressly fixes the situs among others of the work or improvements as the Augusta-Sun River Road, Lewis and Clark County, Montana, and elsewhere in the State of Montana (R. p. 148) and expressly embraces injuries, including death, "by reason of and during the progress of the work described at the places named therein and elsewhere if caused by employees of the assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places," (R. p. 133). If the paragraph stopped at that point there could be no question that the deaths of plaintiff's intestates were within the protection of the policy, the evidence being that the injuries were sustained by reason of and "during the progress" of the work and were caused by employees of the assured whose duties required them to be at other places. The policy then protects against injuries and death caused by employees while engaged in the use or maintenance of an automobile upon the "insured premises" (R. p. 136), or caused by an "automobile" * * * "at the immediate places where the assured is carrying on his operations" (R. pp. 154, 155). Analyzing the policy applicable to the places described in Statement 4 several different meanings may be drawn.

It may be liberally construed as protecting against injuries caused by employees using automobiles at any place on the Augusta-Sun River Road on which the improvements were made but not elsewhere, or it may be construed as embracing only injuries caused by automobiles used by employees of the assured whose duties do not require them to be elsewhere than on the Augusta-Sun River Road, or again it may be construed as excluding injuries caused by employees using automobiles on the Augusta-Sun River Road which employees are required by their duties to be at other places from time to time, or it may be interpreted to mean that it protects against injuries caused by employees either at the places described provided that such injuries are not caused by automobiles, or it may be read to mean that it covers only injuries other than by automobile caused by employees while and whose duties require them to be at the place or places of operation and elsewhere and excludes injuries caused by employees whose duties require their presence at all times at the place of operations and never elsewhere. Scrutiny of the language of the paragraph will disclose that all of the above and additional varying meanings may be reasonably inferred. Further, the extent and place of coverage is described as injuries and death sustained "by reason of and during the progress of the work described in Statement 4 at the places named therein and elsewhere." Reference to Statement 4 (R. p. 148) will show that the places named are described in sufficiently broad language as to include the entire road unit known as the Augusta-Sun River Road, that is, the stretch of road between Augusta and Sun River, and

which includes the point on such road at Simms where the deceased were injured.

If the strict interpretation of the policy as contended by petitioner without resort to the surrounding circumstances, be adopted the only injuries covered by the policy would be those sustained while an employee is using or maintaining an automobile while physically standing or moving upon the uncompleted bridge or stockpass, an interpretation which leads to absurdity.

It will be observed that there is a conflict between the provisions of Paragraph 1 of the insuring agreement which excepts from liability injuries caused by employees using automobiles or other vehicles (R. pp. 133, 134) and the terms of exclusion No. 3 and endorsement (B) (Record pp. 154, 155) which inferentially protects from injuries by automobiles used or maintained upon the insured premises (R. p. 148) or at immediate places covered by policy where assured is carrying on his operations (R. p. 155). Manifestly the policy is uncertain as to intention as to what injuries are covered or what excepted, or what the places are within the protection of the policy where the assured is carrying on its operations. What can be designated with certainty as the "immediate places" where the assured is carrying on his operation as stated in the endorsement when considered with the provisions of paragraph 1 of the policy which describes the injuries within its protection as those sustained "by reason of and during the progress of the work described in Statement 4 and elsewhere"? (R. p. 133). Consequently the Court must look to the surrounding circumstances and

the purpose sought to be accomplished in order to say with certainty what the policy means.

> "A contract may be explained by reference to the circumstances under which it is made and the matter to which it relates."
>
> *Sec. 7538 Rev. Code Montana.*
>
> "For the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of the parties whose language he is to interpret."
>
> *Sec. 10521 Rev. Code Montana.*

By virtue of the above statutes the policy is to be construed with reference to the original contract and bond, and in addition the language of the policy is to be interpreted most strongly against the defendant company, who is responsible for the uncertainty.

Whether the judgments entered into in favor of respondent be right upon estoppel or under the principle of construing the highway contract bond and policy of insurance as one agreement or relating to substantially one transaction within the rules heretofore discussed, or whether supported by the decisions in Gary Hay and Grain Co. v. Carlson, 79 Mont. 111, 255 Pac. 722, and Federal Surety Co. v. Basin Construction Co., 91 Mont. 114, 126, 5 Pac. (2d) 775, referred to in the minority concurring opinion of Circuit Judge Haney, (R. pp. 474, 475) the same result is effected i. e. the protection of members of the public as intended by the highway contract.

The Court will note that there is ample authority here-

inbefore cited from the court of last resort of Montana supporting the judgments on the merits.

Where the trial court has rendered the right decision its action will not be reversed even though based on a wrong ground.

White Packing Co. v. Robertson,
(C. C. A. 4th) 89 F. (2d) 775;

United States v. Holt State Bank,
270 U. S. 49, 70 L. ed. 465, 469;

George O. Richardson Co. v. Scott,
276 U. S. 128, 72 L. ed. 497.

As to a question controlled by state law the law of the state will control in dealing with the construction of insurance contracts.

Ruhlin v. New York Life Ins. Co.,
304 U. S. 202, 82 L. ed. 1290.

On page 39 of the petition the petitioner refers to the case of National Surety Company of New York v. Ulmen, 68 Fed. (2d) 330, certiorari denied 78 L. ed. 1479. This decision was called to the attention of the District Court and Circuit Court of Appeals in the briefs submitted in those courts by the parties.

The cited case is clearly distinguishable both on the facts and law from the instant causes.

The Court in the cited case held that because the contract contained no provision requiring the contractor to pay members of the public for injuries sustained by reason of the failure of the contractor to provide barricades, lights and warnings, a member of the public injured was a stranger to the contract. Obviously there is a marked difference in the cited case where the members of the public were not mentioned and the present case where

the agreement expressly mentions members of the public and obligates both the contractor and his surety to furnish liability insurance to indemnify (in other words to pay) members of such public for the injuries sustained by reason of the carrying on of the contract work. In brief, the very conditions not existing under the contract and bond in the Ulmen case are present in the case at bar, to-wit, the respondent's intestates being members of the public protected by the contract and bond were not strangers to the contract (Slavens v. Ins. Co. 27 Fed. (2) 859) and there is an express provision in the contract for indemnification (or payment) of such persons as members of the class. To urge that the Ulmen case conflicts with the Circuit Court decision is to ignore the present contract provision for payment for the injuries under the insurance provision of the contract.

No Prejudicial Error Established

The burden is upon the petitioner to show prejudicial error to its substantial right in order to invoke the discretion and jurisdiction of this Court. This it has wholly failed to do.

Rule 61 Federal Rules of Procedure.

To induce the Court to exercise discretion favorable to the petition certain specifications from various contracts are set forth on pages 26 to 35 of the petition. None of the contracts contain a provision for liability insurance identical with the language used in the highway contract in this case which is quoted on page 6 of the petition for certiorari. With the exception of the contracts quoted paragraphs 4 p. 30, 5 and 6 p. 32 and 8

p. 34, the contracts require generally "Contractor's Public Liability Insurance" or "Contractor's Protective Public Liability Insurance" or "Protective Public Liability Insurance" or "employers' general liability insurance." Not one of these contracts specify "public liability insurance to indemnify the public for injuries or damages sustained by reason of carrying on the work," the language in the contract at bar. The provisions in the other contracts quoted in aforesaid paragraphs 4, 5 and 6 require liability insurance to protect from "claims for damages for personal injury, including accidental death," * * * "which may arise from operations under this contract."

The contract in paragraph 8 requires workmen's compensation insurance for payments "to workmen in case of temporary or permanent disability resulting from the work provided herein." None of the insurance policies written under any of the foregoing contracts are before the Court, nor any of the circumstances surrounding the furnishing of the policies are presented. Of necessity any questions arising under such contracts, containing different language than the contract before the Court, and the insurance policies issued cannot be determined by the rule applicable to the facts and circumstances now being considered.

The contracts quoted from were not offered in evidence in this case, and only purported copies of parts of these contracts are presented. It would be a strange innovation in the law and procedure of Courts that the respondent's rights arising out of certain specific instruments should be defeated or modified by certain limited pro-

visions from independent contracts with different language entered into by strangers and without a showing of similarity of surrounding facts and circumstances with those now before this Court.

It is urged (Petition p. 36) that the provisions of the contract in this case as well as the contracts quoted from are so broad as to indemnify the public irrespective of negligence. That question is moot. However, the words "public liability" insurance clearly refers to a liability imposed by law since if the injuries were sustained by reason of an act of the contractor which was not prohibited and which he could lawfully do there would be no liability under the familiar rule of damnum absque injuria.

Conclusion

It is respectfully submitted that neither the petition nor record herein discloses any prejudicial error or any of the grounds bringing the cause within the requirements of Section 240 of the Judicial Code, as amended 28 U. S. C. A. 347, and rule 38 of the rules of this Court, and therefore the petition for writ of certiorari herein should be denied.

E. J. McCabe

Attorney for the Respondent.

APPENDIX

Excerpts from pages 14 and 15 of Respondent's Brief filed in Trial Court, referred to, ante, page 14. "The defendant insurer undertook the obligation of protecting the public and was paid the premium it demanded therefor. It urges now that it should be granted the financial benefit without being compelled to assume the incidental burden contrary to Sec. 8750 R. C. M., 1935, which requires that he who takes the benefit shall also take the burden." * * * "In signing the bond and issuing the policy in conformity with the agreement the defendant agreed to such provision and is bound thereby. It is estopped by its agreement to now urge a contrary construction."

"One must not change his purpose to
the injury of another."

Sec. 8741 R. C. M.

Gilna v. Barker,
78 M. 357, 254 Pac. 174.